Supreme Court, U.S.
FILED
MAR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

K MART CORPORATION,

Appellant,

v.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

REPLY MEMORANDUM

Of Counsel:

JOSEPH HENRY UBERUAGA II

EBERLE, BERLIN, KADING,
TURNBOW & GILLESPIE, Chtd.
300 North Sixth Street
Post Office Box 1368
Boise, Idaho 83701
(208) 344-8535

*LARRY L. SIMMS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

**Counsel of Record*
for Appellant

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF AUTHORITIES

CASES:	Page
Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984)	5,7
Hillsborough v. *Cromwell*, 326 U.S. 620 (1946)	4
Iowa-Des Moines Bank v. *Bennett*, 284 U.S. 239 (1931)	3
FEDERAL CONSTITUTION:	
Commerce Clause, Art. I, § 8, cl. 3	5
First Amendment	8
Fourteenth Amendment (Equal Protection Clause)	8
STATE REGULATION:	
IDAPA 35.20.13-15A, now IDAPA 35.02.13, 15.C.	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1286

K MART CORPORATION,

Appellant,

v.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of Idaho

REPLY MEMORANDUM

In its Motion to Dismiss or Affirm ("Motion"), appellee Idaho State Tax Commission ("Tax Commission") advances the remarkable proposition that the patently unconstitutional exemption under Idaho's tax scheme, as made express in Regulation 15A, of newspapers from payment of any sales or use tax on advertising supplements raises no substantial federal question because that regulation is asserted to be "inconsistent," Motion, at 2, with the pertinent state tax statutes.[1] Under the Tax Commission's reasoning,

---

[1] The Tax Commission's assertion, Motion, at 2, that the court below "held" Regulation 15A to be "invalid for being inconsistent with the statute" is a transparent attempt by the Com-

a State would be free to practice virtually any form of unconstitutional discrimination without being obligated to equalize its treatment of persons who have been constitutionally injured so long as that State were prepared to confess that its legislature never authorized the particular discrimination. The Tax Commission does not, of course, cite so much as a single case in this Court in support of that sweeping proposition because no case does so.[2] Indeed, the Tax

---

mission to avoid having to mount a defense in this Court to the blatant discrimination it practiced against appellant during the relevant tax period. That assertion may also be intended to suggest that this case is of no continuing significance insofar as the Commission's administration of Idaho's tax laws is concerned. The Commission's assertion is, however, disingenuous because, as discussed below, the actual position of the Commission in this Court is that the unequal taxation challenged by appellant has its roots in the Idaho Sales Tax Act itself, not just in Regulation 15A. That Act, according to the Commission, Motion, at 13-14, permits the taxation only of the sale or use of tangible personal property and, so interpreted, could not provide a basis for taxing a newspaper's printing of appellant's advertising supplements because the Commission maintains that that transaction involves no transfer of ownership of tangible personal property. The clear import of the Commission's position in this Court is that it asserts the authority to continue to enforce Idaho's tax laws in precisely the same manner that led to appellant's challenge. Appellant submits that what the court below actually did was to avoid altogether passing on the validity of Regulation 15A by, in effect, denying appellant the right to challenge that regulation and the statutory scheme of which that regulation was, and continues after the decision below to be, an integral part.

[2] It is important to bear in mind that at no time in this litigation has the Tax Commission ever suggested that the discrimination authorized by Regulation 15A did not in fact occur. Thus, the Commission's argument necessarily reduces to the

Commission's defense of the judgment below itself raises a substantial federal question, because if the several States may conduct the business of government under the theory propounded by the Tax Commission, the ability of persons, including corporate entities such as appellant, to vindicate their federal constitutional rights to equal treatment under the law would be, particularly as regards taxation,[3] nullified.

In advancing this argument, the Tax Commission does not deny appellant's assertion, Juris. Stat., at 7 n.1, that "the discrimination practiced under Regulation 15A was practiced by the State of Idaho for the entirety of the taxable period involved in this case." Nor does the Tax Commission deny appellant's assertion, Juris. Stat., at 15, that "[i]n the Idaho courts, the [Tax Commission] forthrightly acknowledged that Idaho's tax scheme gave preferential treatment to newspapers . . . ." The Tax Commission does not dispute these assertions because there is no basis for its doing so.[4]

---

proposition that a state official acting contrary to *state* law cannot invade federal constitutional rights of private persons. That proposition was squarely rejected by Justice Brandeis, writing for a unanimous Court, in *Iowa-Des Moines Bank* v. *Bennett*, 284 U.S. 239, 246 (1931).

[3] Because it is extraordinarily difficult for a private party to secure an injunction against the collection of taxes in either the federal or state court systems, the ability of States under the Commission's argument to impose unconstitutional taxation without fear of having to disgorge unjustly collected revenues is manifest.

[4] The Tax Commission, Motion, at 4, makes the curious statement that "K Mart was taxed under authority of the statutes and has not actually been subjected to the regulation it challenges." That statement is, literally, untrue even if it were rel-

As importantly, the Tax Commission does not challenge appellant's assertion, Juris. Stat., at 12 n.6, that as a matter of state law it can no longer force those newspapers which benefited from the preferential treatment accorded by Regulation 15A between 1974 and 1977 to pay a sales tax on advertising supplements they printed and distributed during that period. At bottom, the Tax Commission's apparent position before this Court is that the provisions of the federal constitution invoked by appellant in the Idaho courts and this Court do not redress the constitutionally unequal treatment perpetuated by Regulation 15A and the Idaho tax scheme at issue. But as appellant argues, Juris. Stat., at 11-12 & 16-17, the Constitution, *ex proprio vigore*, provides a federal remedy for the unlawful collection of a tax from one taxpayer if that tax is not imposed on a constitutionally similarly situated taxpayer. Applying this Court's statement in *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946), the right involved in this case "is the right to equal treatment. . . . The constitutional requirement . . . is not satisfied if a state does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seek-

---

evant to the issues in this case. Regulation 15A specifically classifies the sale of "advertising stuffers" by a non-newspaper printer to an advertiser as a "retail sale of tangible personal property." The Tax Commission expressly relied on Regulation 15A from the beginning, as indicated in the January 18, 1982 decision of the Idaho Board of Tax Appeals in this matter. Juris. Stat. App., 30a. That same regulation expressly exempts from taxation the same "advertising stuffer" if printed and distributed by a newspaper. Thus, appellant has not only been "subjected to the regulation it challenges," but it must, pursuant to the judgment below, pay a tax which Idaho newspapers were not required to pay.

ing an upward revision of the taxes of other members of the class."

The majority of the Tax Commission's Motion, at 5-16, is largely unresponsive to appellant's positions because it defends the constitutionality of certain applications of Idaho's tax scheme which appellant has never challenged in this litigation[5] after purporting to eliminate from consideration the very discrimination which gave rise to appellant's constitutional challenge to the Idaho tax scheme—the preferential treatment of Idaho newspapers under Regulation 15A on its face and as implemented by the Commission.[6]

---

[5] Contrary to the Commission's assertion, Motion, at 19 n.8, appellant does not "concede" that it "properly owes" tax on advertising supplements which it uses in its stores in Idaho. If, under Idaho's tax scheme, such advertising supplements would be taxed equally whether printed by an out-of-state printer or in-state by an Idaho newspaper, the imposition of that tax might not be challenged by appellant. The salient point, however, is that appellant has not challenged that tax in this case, which makes irrelevant the Commission's assertion.

[6] The Tax Commission argues, Motion, at 9, that because neither in-state nor out-of-state newspapers pay any tax on advertising supplements which they print and distribute, "both in-state and out-of-state printing businesses are treated equally" and, therefore, there is no discrimination against interstate commerce. However, the Commission cites no case in this Court for the proposition that a State may escape the strictures of the Commerce Clause by failing to discriminate against *all* of the interstate commerce that may be implicated in a particular discriminatory scheme of taxation. *Cf. Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984) (commercial advantage extended to some, but not all, in-state manufacturers of alcoholic beverages held violative of Commerce Clause). Thus, that some unknown out-of-state newspaper publisher *might* have, during the relevant period, printed and distributed with its newspaper some of ap-

In at least one respect, however, the Commission's argument warrants a reply because under it the Commission would, in the total absence of Regulation 15A, continue not to impose any tax on advertising supplements printed for appellant by Idaho newspapers while continuing to impose a use tax on the same supplements if printed by appellant. Under that argument, Motion, at 13-14, an advertising supplement printed by a newspaper is not taxed because it purportedly "involves no transfer of ownership of tangible personal property between the parties to the contract." *See also* Motion, at 4 n.1. This argument was rejected by the trial court, which squarely held that "[t]here is no difference in the product prepared by either printer or in the printing services performed." Juris. Stat. App., 23a. But the Tax Commission's reiteration of this argument in its Motion suggests strongly that, in the future, the Commission will not impose a sales or use tax on appellant's advertising supplements so long as those supplements are printed, as well as distributed, by Idaho newspapers.

Indeed, under the Commission's argument it apparently regards itself as having no statutory authority to impose any tax on advertising supplements printed by Idaho newspapers because it does not view such a "transaction" as involving the sale or use of tangible personal property in Idaho which would per-

---

pellant's advertising supplements without paying Idaho's use tax is of no avail to the Commission. Furthermore, appellant in this case claims a right of access to the distribution systems of Idaho newspapers on the basis of tax treatment which does not discriminate *against* interstate commerce.

mit taxation under Idaho's sales or use tax statutes.[7] Absent a representation to this Court—and the Tax Commission has made none—that it has revoked Regulation 15A, that it presently possesses the statutory authority to impose a sales or use tax on advertising supplements printed by Idaho newspapers, and that it intends to tax those advertising supplements, this Court must assume that the Tax Commission will continue to implement Idaho's sales and use tax statutes in the same unconstitutional fashion as it has in the past notwithstanding the Commission's facile statement that the court below believed Regulation 15A to be "inconsistent" with those statutes.[8]

Finally, the Tax Commission's assertion, Motion, at 16-19, that there is no split of authority among the

---

[7] In the court below, the Commission took the position that it does not tax advertising printed by a newspaper published and distributed with the newspaper (whether as part of the newspaper or as a separate "supplement" to it) simply because the contract between the advertiser and the publisher is not a sale of tangible personal property. It necessarily follows from this position, which the Commission continues to embrace in this Court, that it has no statutory authority to impose a sales or use tax on the printing of advertising supplements by Idaho newspapers. Given this, the court below necessarily sustained, for purposes of this Court's *appellate* jurisdiction, the validity of Idaho's tax scheme challenged by appellant because it either upheld the sales and use tax statutes or it denied appellant the opportunity to challenge them. *See* Juris. Stat., at 11-12.

[8] Even if Idaho's legislature were to enact a statute authorizing the taxation of what the Commission terms the "contract" between an Idaho newspaper and a person to print advertising supplements, implementation of that legislation "would not relieve the harm inflicted during the time the [appellant's] imported products were taxed but locally produced products were not." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S., at 267-68 n.7.

state courts regarding the federal constitutional questions presented by this case is incorrect. As appellant argues, Juris. Stat., at 21-22, the Supreme Courts of Tennessee and Wisconsin have expressly rejected federal constitutional challenges to discriminatory taxation indistinguishable from that at issue in this case, while the Supreme Court of Alabama, Juris. Stat., at 23 & n.14, has struck down such discriminatory taxation under the Equal Protection Clause of the Fourteenth Amendment.[9]

The questions presented by this case are clearly substantial and warrant plenary review by this Court. The theory under which the Tax Commission would have this Court dismiss this appeal for want of a substantial federal question or affirm the judgment below is without precedent in this Court and is demonstrably inconsistent with cases decided by this Court. The Tax Commission's refusal to defend directly the preferential treatment of newspapers under Regulation 15A and the Idaho Sales Tax Act does not render the judgment against appellant any less unconstitutional. The reiteration in this Court by the Commission of its position that, as a matter of state law, the printing of advertising supplements by Idaho

---

[9] In apparent recognition of the force of appellant's First Amendment challenge, the Tax Commission supplants its correct characterization of Regulation 15A in the court below as granting preferential treatment to Idaho newspapers with the assertion that "all printed material is similarly taxed" and that the tax "does not single out the newspaper or printing industry." Motion, at 16. This assertion is unadorned misstatement; if it were not, the trial court would not have declared Regulation 15A to be unconstitutional and the Supreme Court of Idaho would not have distanced itself from the "questionable distinctions" challenged by appellant.

newspapers does not constitute a taxable event suggests strongly that the Commission intends to perpetuate this unconstitutional discrimination. Probable jurisdiction should be noted and this case should be set for argument.

Of Counsel:

JOSEPH HENRY UBERUAGA II

EBERLE, BERLIN, KADING, TURNBOW & GILLESPIE, Chtd.
300 North Sixth Street
Post Office Box 1368
Boise, Idaho 83701
(208) 344-8535

*LARRY L. SIMMS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

**Counsel of Record*
for Appellant